

[*McDonald v. University of Missouri*](#), 90-ERA-59 (ALJ Nov. 7, 1991)

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U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: November 7, 1991
CASE NO: 90-ERA-0059

In The Matter Of

Mara McDonald,
Complainant

v.

University of Missouri,
Respondent

Counsel:

Joel E. Anderson, Esq.
For the Complainant

Kathleen Murphy Markie, Esq.
For the Respondent

Before: CHARLES P. RIPPEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises from a complaint of Mara McDonald that she was discriminated against because, he complained of violations of the Energy Reorganization Act of 1974, As Amended (ERA), 42 U.S.C. 5801 *et seq.* and the regulations promulgated thereunder at 29 C.F.R. Part 24 by her employer, the University of Missouri.

Mara McDonald was first hired by the Respondent as an Instructor in Biological Sciences, on a half time basis. That appointment began November 1, 1989 and ended December 20, 1989. Next, she was hired as a Postdoctoral Associate, working for Dr. Russell Sage, on a half time basis from February 1, 1990 through February 28, 1990. She received another appointment for the period from March 1, 1990, through April 30, 1990 on the same terms as the February appointment, except that her appointment was for work on a three quarter time rather than a half time basis, and yet another appointment for the month of May, and another for the month of June, 1990, except that for those two months she was employed on a full time basis. That was her last appointment to the Division of Biological Sciences. On July 1, 1990 Mara McDonald was appointed as a Senior Research Laboratory Technician in the Veterinary Diagnostic Laboratory of the University of Missouri, on a half time basis.

While working for the University with Dr. Sage as her supervisor during February and March of 1990, Dr. McDonald was Dr. Sage's only postdoctoral associate. She spent almost all of her time in his laboratory. She was the senior person in the laboratory, the only person working for Dr. Sage, and Dr. Sage looked to her for the proper running and management of the laboratory. Dr. Sage, himself, visited the Laboratory perhaps five or ten minutes per day. Anything he saw amiss while he was in the laboratory he would mention to Dr. Sage and expect that she would see to it that the situation was corrected. Dr. Sage never announced to others working in the laboratory that Dr. McDonald was "in charge" or that they should follow her directions. The situation was ambiguous, in that Dr. Sage acted toward Dr. McDonald as if she had the responsibility for the laboratory, but never informed others that Dr. Sage had the "authority" to manage the activities in the laboratory.

Dr. McDonald was hired to work under a National Institutes of Health Grant. She was hired in advance of the award in the anticipation and hope that it would be awarded. The original grant application had been for a four year project, as discussed with Dr. McDonald prior to her engagement, but as finally approved the grant was for three years, subject to annual renewal. The starting date for the grant was April 1, 1990.

During the week of March 19, 1990, Dr. Sage was absent on a field trip to Texas. Upon his return, Dr. McDonald reported to

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him violations of the regulations governing the handling of radioactive materials by Nidia Arguedas, a graduate student working in the laboratory. In Dr. Sage's absence, Dr. McDonald had taken the matter of the regulation violations up with Dr. David, the Director of the Division of Biological Sciences, and had requested that Nidia Arguedas be barred from working in the laboratory until Dr. Sage returned. Dr. David did not bar Nidia from the laboratory, but obtained her agreement to meet with one Jamie Shotts of the Environmental Health and Safety Office in order to learn from him the correct protocols for handling radioactive materials. This did not satisfy Dr. McDonald because

she was convinced that the problem was one of performance, Nidia Arguedas refusal to carry out the safety regulations, rather than lack of information about what was required. Dr. McDonald was certain she had instructed Nidia accurately as to what was required.

On Dr. Sage's return, he met with Dr. McDonald on March 24, at which time Dr. McDonald told him of two safety violations by Ms. Arguedas, one involving radioactive sulphur in the unlabeled freezer, and the other involving the storage of dry waste, and also informed him of the personality difficulties in November, 1989. This was the first time that Dr. Sage has been informed of safety violations by Ms. Arguedas or of personality clashes between them, and this was the only occasion on which Dr. Sage was informed of safety violations. On March 26, 1990, Dr. Sage asked Dr. McDonald for a more detailed explanation of what had transpired, and said he would think about what was going on. The following day, March 27, Dr. Sage told Dr. McDonald that he accepted Nidia's agreement to take training as a good faith attempt to work safely in the laboratory and that, for the moment, he was satisfied.

Dr. Sage had been informed that the NIH grant under which Dr. McDonald was working had been cut by NIH, and on March 27 he informed Dr. McDonald that because of this funding reduction he could only fund her at 75% of a full time equivalent, and he also informed her of his intent to hire an undergraduate, Angela Anders, under another grant, to work in the laboratory. Dr. McDonald responded by demanding that Dr. Sage fund her fully before funding other persons. Also on this date Dr. McDonald discussed with Dr. Sage a medical problem she was having that made it difficult for her to control her emotions, and a discussion in

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which Dr. McDonald, according to Dr. Sage, complained about unsatisfactory relationships she was having with the graduate students working in the laboratory.

Also on March 27, Dr. McDonald requested from Dr. Sage a written job description and stated that she would not be responsible for an x-ray processor or any other duties until she obtained a job description.

On March 28, 1990, Dr. Sage left for a meeting in Colorado and was gone through April 10, 1990. Before he left he told Dr. McDonald that she was responsible for keeping "peace" in his laboratory and that if there was not "peace" when he returned he would have to make some "choices". Although Dr. McDonald was his only post doctoral assistant, and clearly the senior person working for him in the laboratory, he had not stated to any of the other persons in the laboratory that she had any administrative responsibility or authority. During his absence the situation did not change and Dr. McDonald says the violations continued.

Also, there were other problems in addition to the violations. Dr. McDonald informed Angela Anders that because of Dr. McDonald's dispute with Dr. Sage regarding funding,

she would not train Ms. Anders; told Nidia Arguedas in front of Angela Anders that she could not use her sterile reagents and that Nidia's doing so was not proper conduct in a laboratory; made what Nidia Arguedas regarded as intentionally sarcastic comments to her regarding her husband and children; argued with Margaret Ptacek and refused to teach her how to use an x-ray developer, and informed the Director of the Division that she would not do so; and informed Ms. Arguedas that she must do her dishes in another laboratory although no distilled water was available there.

On April 11, after Dr. Sage returned, Dr. McDonald informed him that Ms. Arguedas was still doing "shitty work" but made no mention of any safety problems. Dr. McDonald told Dr. Sage she had been speaking with various persons, including personnel in the Dean's Office, regarding the situation in the laboratory and the relationship between the two of them and that there was a possibility that a mediator would be coming into this matter. I quote Dr. Sage's own words as to his reaction:

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"I told her that I would like her to leave my lab. I explained that I have no confidence in her and that the lab has been completely disrupted with respect to the possibility of Nidia working there. I suggested that we figure out the minimum amount of time it would take her to generate enough data so that she could publish a paper on the topic she has been working on. She said she didn't know how long that would be."

This action of Dr. Sage's on April 12, 1990 did not immediately change Dr. McDonald's status either as his assistant, as an employee of the Division of Biological Science, or as an employee of the University of Missouri. On April 16, 1990, the locks were changed on the laboratory to prevent Dr. McDonald from entering and she was told her contract would not be renewed beyond April 30, 1991.

Dr. McDonald did not file her complaint with the U. S. Department of Labor alleging a violation of the whistleblower provisions of the Act until May 26, 1990. This was clearly beyond the 30 day period within which a complaint must be filed if the time period starts to run in mid April of 1990. It is the position of the Respondent that the time did start to run then, was not interrupted, and that Dr. McDonald's complaint under the Act is thus barred as not having been filed on a timely basis. This also is the position of the Assistant Secretary of Labor for Occupational Safety and Health.

The Complainant asserts that actions taken on behalf of the University led the Complainant to delay filing her complaint, and that the 30 day period should be stopped on these equitable grounds. Alternatively, the Complainant argues that the decision in mid April to terminate her contract at the end of April was not a final decision, later decisions having been made first to terminate it at the end of May, and later at the end of June constituted new discriminatory decisions, and that the 30 day period should not be held to have started running until June 28, 1990, the date upon which she was informed

that her contract would finally end two days later on June 30, 1990. First, I will discuss the equitable estoppel just mentioned

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Equitable Estoppel

On April 20, 1990, Dr. McDonald had a telephone conversation with Phillip J. Hoskins, an attorney in the General Counsel's Office of the University of Missouri. The Complainant says that he told her that she was required to exhaust the University's internal grievance procedure before she could file a complaint with the Secretary of Labor. Phillip Hoskins testifies that although he suggested that "she might want to first exhaust her available remedies through the University grievance procedure" he never told her that she was "required" to do so. Mr. Hoskins testified that he could not remember his precise words, only his intent in the conversation. He told her that he could not represent her because he would be representing the University, and that the first question he would ask would be whether she had utilized the grievance procedure. Even if Mr. Hoskins did not tell her she must use the grievance procedure first, it was his advice that she do so, and he did not mention that limitation periods within which complaints might be filed under regulations or statutes would continue to run, and, if exhausted, would cut off her rights. Even though Mr. Hoskins may not have known of the applicable time period within which a complaint must be filed under the Energy Reorganization Act, and unmistakably should have understood that to delay filing a complaint until after grievance proceedings had been exhausted might well cause any subsequent complaint she might file under that Act to be time barred. In my view, these facts fall within the test laid down by the Court in *Price v. Litton Business Systems, Inc.*, 694 F. 2d 963 (4th Cir. 1982). The statements of Mr. Hoskins on April 20 Create an equitable estoppel that prevents the University of Missouri from asserting that the 30 day period within which complaint's of discrimination under the Act must be filed continued to run after that date.

Dr. McDonald filed a formal grievance against Dr. Sage with the University's grievance procedure system on April 25, 1990, five days after she spoke with Mr. Hoskins. I conclude that she thought that this was required before she went outside the University with her complaints, and that she thought Mr. Hoskins had so stated to her. The words that Dr. Hoskins admits to using that he should have known they were likely to leave that impression to a layperson in the field of law. I cannot know what he said. However, I think he failed to take due care in a situation that required extreme care, knowing that he was a professional talking to a nonprofessional.

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Events From April to June, 1990

When Dr. McDonald was locked out of Dr. Sage's laboratory on April 16, 1990 she was told that her contract would not be renewed beyond its expiration date of April 30, 1990. Dr. Sage later changed his mind, and extended Dr. McDonald s contract through the end

of May, and then again through the end of June, 1990. On June 28, 1990, Dr. Sage informed Dr. McDonald that he would not renew her contract at the end of June. This last decision of Dr. Sage's was not modified, as the earlier ones had been, and payment to her under his research grant stopped as of June 30, 1990. By this time, Dr. Sage had obtained work in the University's Department of Veterinary Science.

On May 3, 1990, Dr. McDonald notified the University that she had been advised to report the safety breaches and practices to the Nuclear Regulatory Commission. On May 29, 1991, Dr. McDonald filed a complaint with the Commission.

The University has agreed that Dr. McDonald filed her complaint of discrimination under the Act to the Wage and Hour Division of the United States Department of Labor on July 27, 1990. Although in its brief the Respondent has taken the position that the filing is not effective until it was received by the Division on June 30, 1990, it is well established that such filings are effective when they are mailed. Dr. McDonald says she mailed the complaint on July 26, 1990, but the one day difference has no legal significance, and I, thus, make no finding regarding this matter.

I find that Dr. McDonald's complaint with the Wage and Hour Division was timely filed. It was timely on at least two grounds.

First, Mr. Hoskins's statements urging her to first file a complaint under the University's grievance procedure equitably tolled the running of the filing period, and, thus, the complaint was timely filed as to Dr. Sage's locking her out of his laboratory on April 16, 1990.

Second, the date of her termination of employment under Dr. Sage's grant was extended, first the termination of April 30, 1990 of which she had been notified was cancelled, then the termination of May 31, 1990 was cancelled, then she finally was notified on June 28, 1990 that she would be terminated as of June

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30, 1990. Her complaint as to the June 28, 1990 notice is timely even without regard to the equitable estoppel discussed in the preceding paragraph. The University may see these extensions as "charitable" to keep from turning Dr. McDonald "out on the street", and they may have been so intended, but they have the legal effect of continuing her assignment as Dr. Sage's postdoctoral assistant. Dr. McDonald was not given notice of the June 30, 1990 termination until June 28, 1990. It is well established that it is the date of final termination notice that governs the commencement of the required filing period, and not the date of termination itself. June 28, 1990 is within 30 days of the date upon which Dr. McDonald filed her complaint with the Wage and Hour Division.

Protected Activity

I conclude that when Dr. McDonald called the attention of Dr. Sage and Dr. David to violations of the applicable regulations regarding the handling of radioactive materials, she was engaged in protected activity. This is in accord with the great weight of decisions by Circuit Courts of Appeal that have considered the question. Only the Fifth Circuit has held that a complaint must be to a responsible governmental official in order to be protected under the whistleblower provisions of the Energy Reorganization Act. The Second Circuit, the Ninth Circuit, the Tenth Circuit have held internal complaints to management to be protected.¹ The Eighth Circuit, in which this case arises, has not addressed the issue. In my view, the finding of internal complaints to be protected activity is consistent with the broad remedial purposes of the whistleblower provisions of the Energy Reorganization Act.

Nuclear Regulatory Commission Conclusions

The reporting of possible violations of the regulations governing the use of radioactive materials is a protected activity, not dependent in any way upon whether or not subsequent investigation instigated by the report revealed the existence of violations. Thus, the results of the investigation by the Nuclear Regulatory Commission that resulted from Dr. McDonald's complaint to the Commission are not legally relevant to the question of whether or not the University violated the whistleblower provisions of the Act with regard to Dr. McDonald. However, they

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are closely involved with the real life situation that gave rise to the complaint of discrimination, and readers of these decisions are always interested in whether the whistleblowing activity engaged in by a complainant led to the disclosure of regulatory or statutory violations.

I divert at this point to discuss the conclusions of the Nuclear Regulatory Commission's investigation of the complaints filed by Dr. McDonald. Some of Dr. McDonald's complaints were unsubstantiated. In order to not overburden the record, I will mention here only the violations that the Commission substantiated.

The Commission found that erroneous and inconsistent information was provided in a quarterly report generated by Dr. Sage. Although Dr. Sage had 410 microcuries of sulfur-35 in his possession on March 31, 1990, based upon prior reports he had filed, his report for that date indicated that he had no sulfur-35 in his laboratory. Dr. Sage did not receive or use any sulfur-35 during the second quarter of 1990. The Environmental Health Service Office of the University (EHS) picked up 250 microcuries of waste sulfur-35 from his laboratory in June of 1990, confirming his possession of sulfur-35 on March 31, 1990.

The inventory record for the first quarter of 1990 stated that a documented survey was performed for sulfur-35 on April 30, 1990. A review of the logbook kept by the

technician who performed the survey indicated that a survey was performed on March 22, 1990, not April 23, 1990. April is not a month within the first quarter for which the report was submitted.

The first quarterly report for 1990 stated that less than one millicurie of phosphorus-32 was used within the three month period. However, a review of the notebook kept by the laboratory employee who used phosphorus-32, at least 1.4 millicuries was used on March 14, 1990 and March 26, 1990 alone. The report also omitted reference to surveys for phosphorus-32 that were made on March 21, 1990 and March 23, 1990.

Dr. Sage did not include a laboratory user of phosphorus- 32 in a list of persons who had used the substance during the first quarter. Dr. Sage's response to the Commission was that he was not clear as to the inclusive dates of the first quarter of

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that year. The fact that the first quarter includes all the dates within the first three months of the year appears to be an elemental fact of general awareness in the population.

The Commission found that Dr. Sage made errors in the recording the quantity units for the amounts of phosphorus-32 received and transferred. Specifically, his report that 310.32 curries of phosphorus-32 were received in April was "obviously erroneous" since EHS would never allow this amount to be ordered by the laboratory.

License Condition No. 28 requires that licensed material be possessed in accordance with the Handbook of Radiological Operations. That Handbook requires than an individual investigator must keep records of the receipt, use, store and disposal of radioactive materials so that he can, at any time, calculate the amount on hand. The Commission found that Dr. Sage failed to do this with regard to phosphorus-32. The Commission attributed this failure to Dr. Sage s unfamiliarity with license requirements, rather than a willful effort by Dr. Sage to provide incorrect information.

The Commission found that interviews with Dr. Sage indicated that he is not very knowledgeable with respect to radiation physics, radiation safety or University radiation safety policies. He was unsure of radiological units and not fully familiar with radiation survey instrumentation or University survey requirements. The Commission found that Dr. Sage relied on his laboratory personnel to keep his program in compliance with University guidelines. While this did not constitute a violation of NRC requirements, "an area of concern was noted with respect to the approval of Sage as an authorized user."

The Commission found that prior to the March training session with EHS, Nidia Arguedas did not have full knowledge of University procedures such as contamination surveys and records were not maintained of such surveys. Also it was found that Nidia Arguedas did not receive adequate training prior to beginning work with sulfur-35 and may not have followed all radiation safety procedures as required. Initial training was not

provided to her either by EHS or by Dr. Sage. From January to March of 1990, Nidia Arguedas handled sulfur-35 while not supervised by technical personnel who were

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fully aware of required University radiation safety procedures. The Commission identified this as an apparent violation of its requirements.

Regarding Nidia Arguedas, improper use of radioactive materials, the inspectors concluded that the additional safety training arranged for her by Dr. Sage was an effective corrective action and that, in this regard, no violations of NRC requirements were identified.

Substance

The Complainant has the burden of introducing evidence which raises an inference of unlawful discrimination, and that burden having been met, the respondent must introduce evidence which establishes a legitimate, nondiscriminatory, reason for its employment decisions.

The parties have stipulated that the University of Missouri is a licensee of the Nuclear Regulatory Commission and that the use of radioactive materials in Dr. Sage's laboratory was pursuant to that license.

In summary, the Complainant has offered evidence that she observed violations of the regulations governing the use of radioactive materials, reported these violations to the University, informed the University of an impending report to the Nuclear Regulatory Commission, and subsequently did report the violations to the Nuclear Regulatory Commission. To meet its burden the University, has testified that the decision not to renew the Complainant's contract of employment was arbitrary, which was the final result of the internal grievance filed by the Complainant, and that it was not arbitrary, but instead based upon Respondent's conclusion that the Complainant could not get along with coworkers.

Dr. McDonald observed numerous violations in the laboratory by Nidia Arguedas, including failure to label a refrigerator, failure to store radioactive materials in appropriate locations, failure to properly keep logs of radioactive materials, spilling radioactive substances in a freezer and leaving, them, and failing to survey for radioactivity. Dr. McDonald's request- ed that Arguedas comply with safety regulations, instructing her as to what she should do. In spite of such requests and instructions, Arguedas continued violating

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safety regulations. It is possible that Arguedas did not understand what she was supposed to do because of language difficulties. I also conclude from the evidence that Arguedas became irritated because she did not think Dr. McDonald had any authority in the laboratory or any right to tell her what to do about anything. This led Arguedas to at first being resistant to direction from Dr. McDonald, and progressed to the point of refusal to do anything Dr. McDonald suggested.

Dr. McDonald concluded that Arguedas would not comply with her directions or the regulations and reported the violations and the difficulties she had in seeking conformance to the safety rules to superiors in the Division of Biological Sciences, the Health Physics department of the University and ultimately to the Nuclear Regulatory Commission.

Upon notification of McDonald's complaints to the principal investigator of the laboratory, Dr. Sage, the Complainant was issued a summary directive to achieve peace in the laboratory or "changes" would be made. When Dr. Sage returned from a trip a few weeks later and "peace" had not been achieved, McDonald was ordered out of the laboratory. Following notification to Sage by McDonald that she had been advised to report all instances of violations to the Nuclear Regulatory Commission, McDonald's contract was not renewed approximately one and one half months later. The close timing between the protected activity and the adverse actions taken against Dr. McDonald raises the presumption that the protected activity played a role in the decisions to take the adverse actions against Dr. McDonald. Dr. McDonald has met her burden for a *prima facie* case of retaliatory discrimination in the failure of the Respondent to renew her contract and in ordering her out of the laboratory. The burden is upon the Respondent to introduce evidence of a legitimate, non-discriminatory reason for its conduct.

As mentioned above, Dr. McDonald filed a grievance with the University complaining of the decision of the Division of Biological Sciences to no longer employ her. After investigation, the University determined that the terms and conditions of Dr. McDonald's employment had been violated, and the decision to terminate her was arbitrary and not the product of reasoned logic. The President of the University of Missouri, Dr. C. Peter McGrath, testified at the hearing as to his judgment that the decision was arbitrary and that his decision was the

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final, unappealable, decision of the University.

I have considered all of the evidence introduced by the Respondent intended to make the case that Dr. McDonald could not get along with her coworkers, and that this was the reason for her dismissal. I have concluded that much of the difficulty in this regard rests with Dr. Sage, and, specifically, with both his pattern of actions which gave Dr. McDonald the responsibility, in his eyes, but not the authority to manage the laboratory, and in his extremely lax view of the radiation safety regulations. While much of the

evidence makes Dr. McDonald appear overly strict, rigid, and authoritarian, I cannot say that this is not due to the strange light of the completely impossible position in which Dr. Sage placed her, and which she allowed Dr. Sage to place her. However, I recognize that in these sorts of situations the subordinate, Dr. McDonald in this case, is in an extremely difficult position to have an effect upon the management style and structure utilized by the superior.

Dr. Sage testified that he wanted his laboratory to run like a Swiss watch on the basis of professional respect and maturity, without anyone being in charge, and without the necessity for rules and regulations. He testified that in March of 1990 Nidia Arguedas was in charge of the handling of radioactive dry waste. When asked if that was something he had communicated to her he said, "No." When asked how she came to be in charge, Dr. Sage answered, "I presume that Margaret, Nidia and Mara (Dr. McDonald) had worked out an arrangement of this." "But you don't know, you just presume," he was asked. Dr. Sage's answer was, "Yes." Dr. Sage then went on, "I only say that sort of in hindsight that if these three people had agreed to a program of shared work, and Mara claims that Nidia was not doing her part, then it was implied that Nidia was responsible for that and was not doing that." No such implication is justified. Dr. McDonald was simply complaining that Nidia Arguedas was mishandling the dry materials. I only quote this material to demonstrate that Dr. Sage was paying little attention, and taking little responsibility for what was going on in his laboratory.

Dr. Sage continued, "We had a lab meeting, twice at least, in which we talked about how the place would work. At that lab meeting, whether I said you do this, that and the other, or I said work it out among yourselves to whichever is most convenient for each of you, I don't know which of those two

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things I said." This is a demonstration of the casual, offhand way in which Dr. Sage supervised, the work of his laboratory.

When reminded that he had testified that Dr. McDonald was the person who would let him know when things weren't running well in the laboratory, that she was "kind of acting as your eyes and ears when you weren't there," Dr. Sage responded, "She could have been, yes, yes." She could have been, or she could not have been, Dr. Sage seems very uncertain about the subject.

I quote from a portion of the hearing transcript, starting at p. 403 where Dr. Sage is being questioned by Claimant's counsel:

Q Did you ever tell Dr. McDonald to enforce compliance with safety in your laboratory?

A I don't remember saying that, no.

Q Did you ever tell Dr. McDonald not to enforce safety compliance in your laboratory?

A No, I'm sure I didn't do that.

Q In terms of how you run your lab, do you consider that a person who is concerned with safety practices of another person in your laboratory, who then seeks the guidance and authority from a senior member of the faculty, to be doing something inappropriate?

A No, I don't.

Q Dr. Sage, let me just ask how you would characterize the general roles of people that work in your laboratory. How do you want people to work together in your laboratory?

A Harmoniously. I want them to be at a level of friendship where they could explain and talk to one another about scientific ideas, techniques. Those are the major things that should be going on in a

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lab. This is an intellectual environment. Everybody's trying to learn something to get science done.

Q I'm assuming that people are learning techniques in your lab if they're there. They're working on learning different techniques?

A Yes, they are.

Q Is it the case, sometimes, that one person is trying to learn to do some particular technique that another person in your lab already knows how to do?

A That is correct.

Q Do you expect the person who knows how to do the technique to collaborate or teach that person the technique that they're trying to learn?

A I do.

Q Is that the kind of cooperation that you're talking about?

A Yes it is.

Q Is it fair to say, then, that a person who may have more expertise in a certain area should provide some guidance and instruction to someone who has less expertise in that area to the degree that it's relevant to whatever work that they're doing in your laboratory?

A To the degree that the learner wants to take it, I would think.

Q With regard to proper procedures in your laboratory, and I'm specifically referring to safety procedures with regard to

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radioactive substances, if there's someone in your laboratory who seems to be being careless or not following very safe procedures or not wearing gloves, to use your own example, would you expect someone else in your laboratory who knows that that is wrong or who knows that that is dangerous to say something to them about it?

A I would.

Q In fact, you were under the belief that Dr. McDonald, at least at the time you were under the belief, that Dr. McDonald had had quite a bit of experience in radiation biology and working with radioactive materials. Is that true?

A Yes.

Q It was your impression that she knew quite a bit about safety rules, at the time?

A Yes, sir.

Q Did you at any time between August of 1989 and June of 1990 have any kind of job description for your post-doctoral Associate? I should say written job descriptions. Let's start with that.

A I think the answer is no.

Q Did you have any job description or set of lab rules that were published or hung up in there for anybody that was working in your laboratory?

A No, I didn't.

Q Is it fair to say then that the way in which your rules about how to run your laboratory were communicated, were

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communicated verbally, primarily?

A I think that's true

Q Was there a time at which Dr. McDonald asked you for a written job description?

A Yes, she did.

Q Did she ask you for a written list of what her responsibilities were and what her authority was in your laboratory?

A Yes, she did.

Q Did you provide her with such a list?

A No, I did not.

Q In fact, you thought that was inappropriate to do?

A I did.

Q Do you recall that Dr. McDonald asked you for this list because she was hesitant to take further responsibility without it?

A That's correct.

Later, at p. 419, Dr. Sage testified that Dr. McDonald was responsible for supervising the laboratory, and that although he had never told her that he thought it was implied from the lab meetings he had held. This is confusing, because from his description of the lab meetings it seemed that Dr. Sage thought that no one should be in charge, that the setting should be completely collegial.

Dr. Sage testified that prior to March of 1990 he had no reports of any tensions or personality clashes or conflicts or stress in his laboratory.

The University concluded, at the highest level, and the end of a lengthy, grievance procedure, that the failure to renew

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Dr. McDonald's contract was "arbitrary". The failure to renew the contract grew out of the events in march and April 1990. A major factor in those events was the failure and refusal of Nidia Arguedas to comply with the safety regulations of the Nuclear Regulatory Commission. These are all tied together.

The Grievance Committee found that in running Dr. Sage's lab, Dr. McDonald was never given any specific instruction on what Dr. Sage wanted done, and was, accordingly, left to her own best judgment. Dr. Sage did not provide her with the direction and guidance from him as her supervising faculty member and Principal Investigator. Dr. Sage allowed tension to mount until it reached the breaking point. At that point, his only direction to his junior colleague was to partially disagree with her prior handling of one issue and to issue a summary directive to correct the problem. Dr. McDonald was entitled to notice that her conduct was improper; some statement as to how that conduct was wrong; some assistance in making her conduct conform to what was expected of her in the position she occupied; and some guidance from her more senior academic colleagues as to how to accomplish what was expected.

The University's Grievance Committee, thus, found that Dr. Sage was arbitrary in his dismissing Dr. McDonald from his laboratory in that he did not give her notice of those aspects of her behavior, judgment and personality to which he objected, and give her a chance to change, to correct the deficiencies he found. The Committee did not find that Dr. McDonald's behavior, judgment, and personality were such that, if they did not change after counseling, there would be no valid grounds for her dismissal. I carefully note that the Committee did not need, and did not, reach any judgment regarding Dr. McDonald in reaching its conclusion that Dr. Sage was arbitrary in dismissing Dr. McDonald without counseling and opportunity for correction.

The University is estopped to deny the conclusions of the Grievance Committee as affirmed by the President of the University. But finding that to be true does not carry us very far toward a resolution of this matter. The University has not sought to depart from the findings of the Grievance Committee. The Grievance Committee did not make findings on the crucial question of this case.

The crucial question of this case is the degree to which

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the fact that Dr. McDonald had raised the matter of violation of the safety regulations of the Nuclear Regulatory Commission a factor in his decision to dismiss her from his laboratory.

I conclude from numerous evidence in this case that Dr. Sage did not take very seriously compliance with regulations regarding the handling of radioactive materials in

his laboratory. This is evident from his own testimony [add]. It is also evident from the findings of the investigation of the Nuclear Regulatory Commission. It also is apparent from his lack of concerned reaction to Dr. McDonald's revelation regarding violations she had observed. His reaction to being told that Nida Arguedas would not observe the requirements after they had been explained to her was simple to send her off to a course of instruction. He did not seek to instruct her himself. It appears from the NRC investigation that he would not have been familiar enough with the requirements to have done so. Besides, he really thought that they only amounted to "common sense". I believe the testimony of Dr. McDonald about his putting grapes and other fruit in a sink used to dispose of mutants and carcinogens, and the placing of champagne bottles in a refrigerator reserved for radioactive materials. Dr. Sage simply did not take any of this very seriously. At the time Dr. Sage locked Dr. McDonald out of his laboratory on April 16, Dr. McDonald had not threatened to go to the NRC, she simply had told Dr. Sage of the violations. Some of the incidents that disturbed Dr. Sage related to use of radioactive materials, but what loomed large in Dr. Sage's mind was the pattern of a series of incidents that led him to conclude that Dr. McDonald was the cause of the interpersonal disturbances in his laboratory that were causing the laboratory to be dysfunctional.

One factor was Dr. McDonald's anger and refusal to accept Dr. Sage's decision to hire Angela Anders in the laboratory at a time when Dr. McDonald was not fully funded. The fact that Angela Anders was being paid from a different grant and doing different work than Angela Anders seemed to make no difference. Dr. McDonald refused to train Angela Anders.

I note in this regard that Dr. John David, Director of the Division of Biological Sciences testified that he believed that the safety incidents gave rise to Dr. McDonald's termination, but only in the sense that it was the manner in which she expressed her concerns, rather than the concerns themselves, that gave rise to her termination.

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I conclude that Dr. McDonald was dismissed from Dr. Sage's laboratory and, ultimately, her contract was not renewed because, fairly or unfairly, she was perceived as the source of conflict and strife that had created an atmosphere in which useful work could not be accomplished in Dr. Sage's laboratory. I do not think that the fact that she had called attention to violation safety regulations was a very important factor. It was only one among many factors. When it was involved it was more just the subject matter around which the disputes and controversy existed, and the dissatisfaction with Dr. McDonald was around the disputation, not the fact that Dr. McDonald had called attention to radiation safety regulation violations.

The University has succeeded in rebutting the presumption created by the prima facie case established by Dr. McDonald.

It is not my duty to decide whether Dr. McDonald was or was not at fault in her dismissal. That is the University's job, and it already has decided that Dr. McDonald's dismissal was arbitrary and have paid her a year's salary of \$25,000.00 in recompense. Thus, I have not considered in this decision the evidence in this record regarding Dr. McDonald's job performance and personal conflicts on the two previous positions she held after obtaining her doctorate, nor Dr. McDonald's attempts to have the Immigration Service change Nidia Arguedas, alien registration status as a result of events involved in this case.

My ultimate holding in this case is only that Dr. McDonald's dismissal from Dr. Sage's laboratory and the employment of the Division of Biological Sciences was not due in significant part to her complaints that regulations regarding the proper use of radioactive materials were being violated, and, thus, those actions by the university did not involve a violation of the Energy Reorganization Act.

RECOMMENDED ORDER

I recommend that the Secretary's Final Order in this case find that the complaint of Dr. Mara McDonald that she was discriminated against in violation of the Energy Reorganization Act be denied on the grounds that her rights under the Act were not violated because of the circumstances raised in her complaint.

Charles P. Rippey
Administrative Law Judge
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[ENDNOTES]

¹*Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F. 2d (2nd Cir. 1982), *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), and *Kansas Gas & Electric Co. v. Brock*, 780 F2d 1505 (10th Cir. 19 5), cert den. 478 U.S. 1011.